No. 01-1471

JUN 3 2002

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In The
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

JOHN BASS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals exceed its jurisdiction by entertaining a Government appeal in a criminal case from a pre-trial order dismissing the prosecution's notice of intent to seek the death penalty, in the absence of any statutory authority for an appeal from such an order?

2. Did the court of appeals properly affirm the district court's finding that the defendant was entitled to discovery in support of his claim of discriminatory prosecution because he had presented "some evidence" of the existence of the elements of that claim?

TABLE OF CONTENTS

	Page
Procedural History	1
Reasons Why the Petition Should Not Be Granted...	4
I. The Court Lacks Jurisdiction to Review This Case on Certiorari Because, Contrary to The Decision of The Court of Appeals, The Government Lacked Statutory Authority to Appeal The District Court's Order	4
II. This Case Is Not Ripe For Review on Certiorari by this Court	11
III. The Decision Below Affirming The Discovery Order Is Consistent With Controlling Precedents from this Court	19
IV. This Is Not an Appropriate Case For Review by this Court on Certiorari	26
Conclusion	29

TABLE OF AUTHORITIES

	Page
CASES:	
Ah Sin v. Wittman, 198 U.S. 500 (1905)	23
Branch Ministries, Inc. v. Charles Rossotti, 970 F. Supp. 11 (D.D.C. 1997)	17
EPA v. Mink, 410 U.S. 73 (1973)	12, 14
Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992)	8
Hickman v. Taylor, 329 U.S. 495 (1947)	12
McCleskey v. Kemp, 481 U.S. 279 (1987)	19, 20, 21, 24
Nixon v. Fitzgerald, 457 U.S. 731 (1981)	5
Sutherland v. International Insurance Co., 43 F. 2d 969 (2d Cir. 1930)	21
United States v. Acosta-Martinez, 252 F.3d 13 (1st Cir. 2001)	9
United States v. Andolschek, 142 F.2d 503 (2nd Cir. 1944)	12
United States v. Armstrong, 517 U.S. 456 (1996)	*passim*
United States v. Berrios, 501 F.2d 1207 (2nd Cir. 1974)	14, 22, 23
United States v. Bradley, 880 F. Supp. 271 (M.D. Pa. 1994)	15, 16, 17
United States v. Candia-Veleta, 104 F.3d 243 (9th Cir. 1996)	14
United States v. Cheely, 36 F. 3d 1439 (9th Cir. 1994)	9

TABLE OF AUTHORITIES – Continued

Page

United States v. Correa-Gomez, 160 F. Supp. 2d 748 (E.D. Ky. 2001) 17

United States v. Daniels, 141 F. Supp. 2d 140 (D. Mass. 2001) 17

United States v. Fernandez, 231 F.3d 1240 (9th Cir. 2000) 9

United States v. Glover, 43 F. Supp. 2d 1217 (D. Kan. 1999) 15

United States v. Green, 108 F. Supp. 2d 1169 (D. Kan. 2000) 14

United States v. Hastings, 126 F.3d 310 (4th Cir. 1997) 16

United States v. Jones, 159 F.3d 969 (6th Cir. 1998) 20

United States v. Jones, 2002 WL 464678 (5th Cir. 2002) 27

United States v. Levasseur, 846 F.2d 786 (1st Cir. 1988) 8

United States v. Llera-Plaza, 181 F. Supp. 2d 414 (E.D. Pa. 2002) 16, 17, 22, 27, 29

United States v. Margiotta, 646 F.2d 729 (2nd Cir. 1981) 9

United States v. Margiotta, 662 F.2d 131 (2d Cir. 1981) 8

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 8

United States v. Martin, 733 F.2d 1309 (8th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1003, 105 S. Ct. 1864, 85 L. Ed. 2d 158 (1985) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Minred, 182 F. Supp. 2d 459 (W.D. Pa. 2002) 27, 29

United States v. Olvis, 97 F.3d 739 (4th Cir. 1996) 16

United States v. Presser, 844 F.2d 1275 (6th Cir. 1988) 10

United States v. Sanges, 144 U.S. 310 (1892) 4

United States v. Sells Engineering, 463 U.S. 418 (1983) 21

United States v. Sisson, 399 U.S. 267 (1970) 7

United States v. Tom, 787 F.2d 65 (2nd Cir. 1986) 8

United States v. Tuitt, 68 F. Supp. 2d 4 (D. Mass. 1999) 17

United States v. Turner, 104 F.3d 1180 (9th Cir. 1996) 16

United States v. Whren, 517 U.S. 806 (1996) 22

United States v. Wilson, 420 U.S. 332 (1974) 4, 6, 7

United States v. Woolard, 981 F.2d 756 (5th Cir. 1993) 9

Wayte v. United States, 470 U.S. 598 (1985) 14

STATUTES AND CONSTITUTIONAL PROVISIONS:

18 U.S.C. § 3731 ..... *passim*

21 U.S.C. § 841(b)(1)(A) 1

21 U.S.C. § 921(j) 1

21 U.S.C. § 846 1

28 U.S.C. § 509 21

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 519 21

28 U.S.C. § 1254 5

Ga. Const., Art. 6, § 8, para. 11 20

FEDERAL RULES:

F.R.A.P. 35(e) 4

F.R. Crim. P. 6(f) 8

F.R. Crim. P. 28(j) 3

F.R. Crim. P. 29(c) 8

MISCELLANEOUS:

http://www.capdefnet.org/fdprc/contents/shared_files/docs/time.htm 15, 28

National Institute of Justice, *Solicitation, Research Into the Investigation and Prosecution of Homicide: Examining the Federal Death Penalty System* (July 20, 2001) 26

Dennis O'Brien and David Nitkin, *Glendening Halts Executions; Md. Governor Is Second to Impose Moratorium; Racial, Geographic Inequality Seen; UM Study to Be Reviewed by next General Assembly*, The Baltimore Sun, May 10, 2002, p.1A. 26

PROCEDURAL HISTORY

On August 19, 1997, Respondent John Bass was arrested pursuant to a federal indictment charging him with conspiracy to distribute crack cocaine in the Northern District of Ohio, in violation of 21 U.S.C. § 846 and § 841(b)(1)(A). On October 29, 1998, Mr. Bass was arraigned for conspiracy to distribute crack cocaine, in violation of 21 U.S.C. § 846, in the Eastern District of Michigan; one week later the Ohio charges were adjourned without date and later dismissed. On December 9, 1998, a second superceding indictment was filed in the Eastern District of Michigan, charging Mr. Bass and thirteen co-defendants, in addition to various drug charges, with multiple counts of intentional killing and firearms murder in the course of drug trafficking, in violation of 21 U.S.C. § 921(j). On August 13, 1999, Attorney General Janet Reno authorized the United States Attorney for the Eastern District of Michigan to seek the death penalty against Mr. Bass only.

In the three-and-a-half years since December, 1998, the Government has dismissed the charges against or entered into plea agreements with all thirteen of the other defendants named in the second superceding indictment, leaving only Respondent John Bass. On May 7, 2000, Respondent was in the midst of entering a guilty plea pursuant to Rule 11 of the Federal Rules of Criminal Procedure when a misunderstanding surfaced regarding the terms of his plea agreement with the Government. The district court adjourned the plea until May 10, 2000, to give Mr. Bass time to confer with counsel. Instead, on May 10, the district court was informed that an extraordinary breach of security had put Mr. Bass's safety at risk: Information that he had given to the Government in

confidence in the course of his plea negotiations had been provided, in writing, to another prisoner in the same detention facility who had been arrested on the basis of information provided by Respondent. As a result, the plea was aborted.[1]

On September 8, 2000, Respondent filed a motion to dismiss the notice of intent to seek the death penalty in his case because of racial discrimination, and for discovery of information relevant to that issue. On October 16, 2000, he filed a supplemental memorandum in support of those motions, providing the district court with copies of a study of the federal death penalty that was released by the Department of Justice on September 12 of that year (the "DOJ Study"), and of a transcript of a press conference by then Attorney General Janet Reno and Deputy Attorney General Eric Holder on the release of the DOJ Study. After argument on October 24, 2000, the district court granted

[1] Specifically, on May 10, 2000, Mr. William Daniel, one of Mr. Bass's appointed attorneys, informed the court that when he went to visit Mr. Bass on May 8 he found him visibly shaken because he had just seen another prisoner who had told him that he knew that Mr. Bass had provided the information that led to the arrest of that prisoner and of his wife. Mr. Bass denied this charge. In response, the other prisoner sent a copy of an FBI "302" interview form to Mr. Bass, via a guard, while Mr. Bass was conferring with Mr. Daniel. The FBI "302" form reported information that Mr. Bass gave about that prisoner, in strict confidence, as part of his pending plea bargain with the Government. Mr. Daniel produced the copy of the "302" form in court. The district court responded to this information in the strongest terms (e.g., "It is just beyond my imagination."), expressed concern about Mr. Bass's physical security, refused to proceed with the Rule 11 proceeding, and – while stating his complete confidence in the integrity of the prosecutors handling the case – requested a formal investigation. A motion to dismiss based on these events was filed in district court on April 23, 2001, and is pending. *See* Appendix A to Respondent's Memorandum in Opposition to Petition for Rehearing En Banc.

Respondent's discovery motion; at that hearing, the Government indicated that it would not comply with the discovery order. The Government's motion for reconsideration was denied on December 20. On January 10, 2001 – after the Government again informed the court that it would provide no information in response to the discovery order, in any form – the district court entered an order dismissing the notice of intent to seek the death penalty for Mr. Bass. The Government filed a notice of appeal on February 26, 2001.

After oral argument on June 14, 2001, the Sixth Circuit affirmed the district court's discovery order on September 25, 2001.[2] The circuit court remanded the case to the district court for further proceedings on issues of privilege, relevance, and undue burden that could not be addressed either by the district court or on appeal because the Government had refused to produce any documents for the trial judge's consideration, *in camera* or otherwise. On October 9, 2001, the Government filed a petition for

[2] On June 8, 2001 – six days before oral argument – the Government submitted to the Sixth Circuit a new report on the federal death penalty that had been released by the Department of Justice two days earlier, on June 6 (the "Ashcroft Report"), together with testimony by Attorney General John Ashcroft before the House Judiciary Committee, also on June 6. These documents were purportedly submitted under F.R. Crim. P. 28(j) which permits a party to submit citations to legal authorities that have come to the party's attention after briefing. Respondent filed a letter in response pointing out that F.R. Crim. P. 28(j) contemplated the submission of *citations*, not documents, to *legal authorities*, not evidence, and requesting permission to file a supplemental memorandum in response. On June 13, at the request of the Sixth Circuit, Respondent filed a supplemental memorandum addressed to the Government's submission.

rehearing en banc,[3] which was denied on December 7.[4] In late February, 2002, the Government requested and received an extension of the period to file its petition for certiorari until April 6, 2002.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

I. THE COURT LACKS JURISDICTION TO REVIEW THIS CASE ON CERTIORARI BECAUSE, CONTRARY TO THE DECISION OF THE COURT OF APPEALS, THE GOVERNMENT LACKED STATUTORY AUTHORITY TO APPEAL THE DISTRICT COURT'S ORDER

The law is clear that "the Government [may] not take an appeal in a criminal case without express statutory authority." *United States v. Wilson*, 420 U.S. 332, 336 (1974), citing *United States v. Sanges*, 144 U.S. 310 (1892).

[3] At oral argument on June 14, 2001, the Government had stated that Respondent voluntarily rejected a plea bargain because it required him to testify against his brothers, and the Chief Judge criticized the Government for referring to matters outside the record. Following the argument, the Government lodged with the court a copy of the aborted plea agreement between Mr. Bass and the Department of Justice, but provided no record of the district court proceedings surrounding that plea bargain, on May 7 and May 10, 2000. *See supra*, note 1. The Government also attached a copy of the plea agreement to its Petition for Rehearing En Banc, but again provided no information on the Rule 11 hearings at which the plea bargain fell apart.

[4] On November 5, 2001, pursuant to F.R.A.P. 35(e), the circuit court requested a Memorandum in Opposition to the Petition for Rehearing En Banc, which was filed by Respondent on November 13, 2001 (and which did provide the court with a transcript of the Rule 11 hearings on May 7 and 10, 2000).

In this case the Government purported to rely on 18 U.S.C. § 3731. But § 3731 nowhere authorizes the Government to appeal the sort of district court order at issue here, which was an order dismissing the Government's notice of intent to seek the death penalty, and not – as specified by the explicit text of the statute defining what orders are appealable – an order "dismissing an indictment or information . . . as to any one or more counts." In the absence of authority to appeal, this Court has no jurisdiction to consider the case on certiorari because this is not a case "*in* the court[] of appeals" as required by 28 U.S.C. § 1254 (emphasis added).[5]

The text of the relevant portion of 18 U.S.C. § 3731 is unambiguous:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court *dismissing an indictment* or information or granting a new trial after verdict or judgment, *as to any one or more counts*, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . .
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

[5] *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 734 (1981): "[W]e conclude that petitioner did present [an] . . . appealable question to the Court of Appeals. It follows that the case was 'in' the Court of Appeals under § 1254 and properly within our certiorari jurisdiction."

Id. (Emphasis added.) To state the obvious: 18 U.S.C. § 3731 does not provide express authority for an appeal in this case because the district court's order did not dismiss the indictment against Mr. Bass, or any count of the indictment, or any portion of any count. It did not alter the indictment by a single word. The statute could only possibly provide such authority if the notice of intent to seek the death penalty were *a part of the indictment*. But that is plainly false. The notice of intent was not included in the indictment, and it was not issued by the grand jury, the judicial body that returned the indictment. It was instead a notice of a decision by the executive branch, made by the Attorney General more than eight months after the second superceding indictment against Mr. Bass was filed.

In *United States v. Wilson*, 420 U.S. at 338, this Court stated:

> While the language of the new Act [18 U.S.C. § 3731] is not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.

This statement in *Wilson*, however, speaks to an aspect of the statute's reach that has no bearing on the issue presented by the Government's attempted appeal in the present case. The district court order at issue in *Wilson* was a dismissal of an *indictment*, a type of order which § 3731 does expressly permit the Government to appeal. The pertinent issue in *Wilson* was whether the current version of § 3731 imposed any non-constitutional restrictions on Government appeals from dismissals based on the *grounds* on which the district court dismissed the

indictment; the Court held that it does not.[6] The Court had no occasion in *Wilson* to consider whether this statute authorizes an appeal when there has been no dismissal of an indictment at all. Nor have there have been any decisions from this Court since *Wilson* that apply § 3731 in the present context.

On the question of statutory interpretation at issue here, there should be no occasion to resort to legislative history (or any other secondary sources of authority) since the meaning of the statute is plain: it permits an appeal from a dismissal of a grand jury indictment, or a portion of

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[6] In *Wilson* the Court reviewed a Third Circuit opinion, 492 F.2d 1345 (1973), that disallowed a Government appeal on the authority of *United States v. Sisson*, 399 U.S. 267 (1970). *Sisson* itself was the last of a long line of cases dating back to *Sanges, supra*, construing and often criticizing the predecessor to the current statute, which made the Government's right to appeal turn on elaborate and murky distinctions between the *grounds* for the district court's action. Thus, for example, in *Sisson*, Justice Harlan commented for the Court:

> Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case. When judged in these terms, the Criminal Appeals Act is a failure. Born of compromise, and reflecting no coherent allocation of appellate responsibility, the Criminal Appeals Act proved a most unruly child that has not improved with age.

399 U.S. at 307. The present statute was passed by Congress in 1970, the same year as *Sisson*, and eliminated the complex structure that had evolved under the prior Act. Instead, § 3731 provides that certain categories of orders may be appealed – including dismissals of indictments – unless the double jeopardy clause prohibits further prosecution.

an indictment, and not otherwise.[7] As this Court has emphasized:

> In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992).

For the most part, circuit court cases applying § 3731 are consistent with the plain meaning of the statute. There are several cases, for example, that hold that dismissal of a portion of a count is appealable as an order dismissing a "count," because, among other reasons, the division of charges into separate counts is often arbitrary.[8] In other cases, courts of appeals have addressed the range

[7] The Court has had occasion to interpret the term "dismissal" in this context. In *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 567 n.4 (1977), the Court held that a judgment of acquittal under F.R. Crim. P. 29(c) – an order that terminates a prosecution under an indictment – should be considered a "dismissal" for the purposes of § 3731. But there has been no uncertainty as to the meaning of "indictment" – it is the charging instrument issued by the grand jury. *See, e.g.*, F.R. Crim. P. 6(f): "A *grand jury* may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned *by the grand jury* . . . ."

[8] *See, e.g., United States v. Martin*, 733 F.2d 1309, 1310 (8th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1003, 105 S. Ct. 1864, 85 L. Ed. 2d 158 (1985); *United States v. Margiotta*, 662 F.2d 131, 139-41 (2d Cir. 1981) (*Margiotta II*); *United States v. Levasseur*, 846 F.2d 786, 788 (1st Cir. 1988). On the other hand, circuit courts have held that orders are not appealable where the dismissed portion of a count did not provide a "discrete basis for the imposition of criminal liability." *See, e.g., United States v. Tom*, 787 F.2d 65, 68-71 (2nd Cir. 1986).

of types of orders that may constitute "dismissal" of the indictment, or of part of it.[9] When courts must decide whether, for the purposes of this statute, an order amounts to a "dismissal," or whether a portion of an indictment constitutes a "count," it is appropriate to give effect to the statutory provision that "this section shall be liberally construed to effectuate its purposes." But that language does not create "explicit statutory authority" to appeal when a basic statutory requirement for appellate jurisdiction is entirely absent.[10]

The Sixth Circuit opinion in the present case, like a few similar decisions in other circuits,[11] is flatly inconsistent with the plain meaning of § 3731. In *United States v. Woolard*, 981 F.2d 756, 757 (5th Cir. 1993), for example, the Fifth Circuit held that a district court's dismissal of the Justice Department's notice of intent to seek the death penalty "was in every practical way as much of an alteration of the grand jury's charge as the striking of predicate acts of forfeiture. . . ." Apparently the court of appeals overlooked the fact that a notice of intent to seek the death penalty is not a part of the grand jury's charge at all.

[9] *See, e.g, United States v. Margiotta*, 646 F.2d 729, 732 (2nd Cir. 1981) (*Margiotta I*) (order requiring an election between allegation amounted to a dismissal of the allegations not elected).

[10] This does not deprive the government of any pre-trial remedy. In *United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1966), for example, "the government itself . . . suggested dismissal of the indictments to the district court so that an appeal might lie." When the government chooses that procedure, it may later re-indict the defendant if the original order is upheld, since jeopardy will not have attached.

[11] *United States v. Woolard*, 981 F.2d 756, 757 (5th Cir. 1993), *United States v. Cheely*, 36 F. 3d 1439 (9th Cir. 1994); *United States v. Fernandez*, 231 F.3d 1240 (9th Cir. 2000), *United States v. Acosta-Martinez*, 252 F.3d 13, 16 (1st Cir. 2001).

Similarly, the Sixth Circuit in this case relied on its earlier opinion in *United States v. Presser*, 844 F.2d 1275, 1280 (6th Cir. 1988):

> In *Presser*, we exercised jurisdiction over the United States's appeal from an order granting a defendant's discovery request because the district court indicated that if the United States failed to comply, it would suppress the relevant evidence, which would likely result in dismissal of the indictment. Here, the United States's failure to comply with the district court's discovery order resulted in dismissal of the death penalty notice – in effect, a partial dismissal of the charge.

266 F.3d at 535-36.[12] In fact, the notice of intent to seek the death penalty is *not* a part of the grand jury's indictment, and the district court's order dismissing that notice did *not dismiss* any portion of the grand jury's charge. As a result, the circuit court erred in holding that 18 U.S.C. § 3731 provided a jurisdictional basis for the Government's appeal.[13]

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[12] The circuit court's description of *Presser* is puzzling. The *Bass* opinion treats *Presser* as a decision based on the first paragraph of § 3731, the one at issue here, which provides for appeals from dismissals of indictments or counts. But *Presser* itself is explicitly based on the *second* paragraph of § 3731, which permits the Government to appeal a suppression order without regard to the possibility that it may result in a dismissal. *Presser*, 844 F.2d at 1279, n.5.

[13] In light of the jurisdictional question in this case – which the Government does not address – the Solicitor General's suggestion of summary reversal (Government's Petition for Writ of Certiorari ("Pet.") p. 24) is peculiarly inappropriate, given that such a disposition (even if it were tenable on the merits) would create a binding precedent on a jurisdictional issue of first impression by construing a statute inconsistently with its explicit language without the benefit of briefing and argument.

II. THIS CASE IS NOT RIPE FOR REVIEW ON CERTIORARI BY THIS COURT

Throughout the litigation below, the Government refused to address critical factual issues in the district court. As a result, there is no record to support the Government's essential claims in its petition for review by this Court.

The starting point is the circuit court's order on remand. On appeal, the Government argued at length that the discovery order required production of documents that are exempt from disclosure by the work product and deliberative process privileges – or irrelevant or non-existent – and that it was excessively burdensome. Brief for the United States ("Br.") pp. 3, 17, 19, 26, Reply Brief for the United States, p. 14. (The Government later raised these same claims again, in its Petition for Rehearing En Banc, p. 8). The Sixth Circuit addressed these issues as best it could, given the state of the record:

> [T]he United States argues that the requested items are either not relevant, non-existent, or already in Bass's possession. The district court indicated that it would hear from the United States as to the unavailability or irrelevancy of particular documents, but the United States chose instead to refuse to comply with the entire order. That refusal also prohibited the district court from reviewing the requested documents to determine whether the United States' claimed privileges applied to any of them. Therefore, we find the record insufficiently developed to allow us to assess the merits of the United States's arguments relating to the content of the requested documents. Because of this, and because we think the district court should have the opportunity to review each requested item's

> relevancy and privileged status in the first instance, we remand to the district court with instructions to allow the United States to produce the documents for an *in camera* review. If the United States again fails to comply, the district court remains free to impose whatever sanction it deems appropriate under the circumstances.

266 F.3d 532, 540.[14] Rather than availing itself of this opportunity to remedy the defects in the record – and by doing so, enable the lower courts to address the central issues in the case – the Government on remand again refused to produce any documents whatever, on discovery or for review by the district court *in camera*. Instead it filed its petition in this Court.

In its Petition for Certiorari the Government no longer argues the issues of *privilege* or *undue burden* by name. Given the remand from the circuit court, and its refusal to address these issues in the district court, how

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[14] Earlier in its opinion, the Sixth Circuit explained:

> The district court, *noting that the United States did not offer any of the allegedly privileged materials for in camera review*, further found that any privileges that may have attached to the materials were outweighed by the constitutional interests implicated by Bass's allegations . . . . 266 F.3d at 535 (emphasis added).

In other words, given the circumstances created by the Government, the district court held that the conditional privileges cited by the Government do not *categorically* trump the defendant's constitutional claims. *See, Hickman, v. Taylor*, 329 U.S. 495, 511 (1947); *EPA v. Mink*, 410 U.S. 73, 86-87 (1973); *United States v. Andolschek*, 142 F.2d 503, 506 (2nd Cir. 1944) (L. Hand, J.). Needless to say, the district court could not decide on the actual status of particular documents except by examining them, as it was directed to do on remand, if the Government requested it.

could it? Instead, the Government makes the same arguments by other names – or, to be precise, in general terms with no names at all. For example, the petition repeatedly asserts that the Government will be required to produce "thousands" of documents (Pet., pp. 12, 20), a "vast array" of documents (Pet., p. 20), and "voluminous" documents (Pet., p. 21), and that assembling them would be "time consuming and highly burdensome." Pet., p. 20. Similarly, the petition argues that the discovery order requires the disclosure of "highly sensitive internal documents" (Pet., pp. 12, 20), will expose and interfere with internal prosecutorial deliberations (Pet., pp. 12, 20), and will "stifle" or "disrupt" frank and orderly prosecutorial decision making. Pet., pp. 12, 21. These doomsday predictions are the very claims of "undue burden" and "privilege" that the Government argued on appeal but has steadily refused to address concretely in the district court, now stated in vaguer terms.

Normally, the sort of factual claims that are alleged in the Government's petition are resolved in the first instance by trial courts, with the assistance of the Government. *United States v. Armstrong*, 517 U.S. 456 (1996), the leading case relied on by the Government, is a good example:

> The Government moved for reconsideration of the District Court's discovery order. With this motion it submitted affidavits and other evidence to explain why it had chosen to prosecute respondents and why respondents' study did not support the inference that the Government was singling out blacks for cocaine prosecution.

517 U.S. at 460.[15] No similar evidence was presented here. The specific claims of privilege that the Government converts here into less specific claims of prejudice are generally resolved by submission of documents to the trial court *in camera* – as the Sixth Circuit explicitly suggested in its remand. *See*, *EPA v. Mink*, 410 U.S. 73, 88 (1973); *Wayte v. United States*, 470 U.S. 598, 616-18 (1985) (Marshall, J., dissenting); *United States v. Berrios*, 501 F.2d 1207, 1212 (2nd Cir. 1974). By refusing to submit any documents to the district court the Government has made that impossible. Without ever seeing any of them, the

[15] Specifically, in *Armstrong*:

> The federal and local agents participating in the case alleged in affidavits that race played no role in their investigation. An Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution, because "there was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring; . . . there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; . . . and several of the defendants had criminal histories including narcotics and firearms violations." . . . The Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that "large-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack."

517 U.S. 456, 460 (citations omitted).

Similar submissions by the Government are common in less celebrated cases. *See, e.g., United States v. Green*, 108 F. Supp. 2d 1169, 1171 (D. Kan. 2000) (government presented testimony from several people); *United States v. Candia-Veleta*, 104 F.3d 243, 245 (9th Cir. 1996) (government presented evidence on charging practices).

district court could not possibly determine whether an entire class of documents is covered by the work product or deliberative process privileges; nor (as the issues are restated here) could it decide whether the documents requested are "highly sensitive," or whether producing them would be "highly burdensome."

This same sensible practice has been followed in two other cases in which district courts have initially granted motions for discovery on the issue at stake here: the possibility of racial discrimination in federal capital charging.[16] In *United States v. Bradley*, 880 F. Supp. 271, 281 (M.D. Pa. 1994), the court issued a discovery order, admonished the parties to cooperate in expediting and simplifying the process, and stated that it would consider the Government's privilege claims *in camera*.[17] In response the Government provided some limited information to the defendant, and submitted other documents to the court *in camera*. After reviewing that submission, the district court

[16] In a third case, *United States v. Glover*, 43 F. Supp. 2d 1217, 1234-35 (D. Kan. 1999), the defendant pled guilty two weeks after the district court issued a similar order, mooting the issue. *See* http://www.capdefnet.org/fdprc/contents/shared_files/docs/time.htm, *infra*, note 24.

[17] "[T]he court will allow the defense a short amount of time to obtain the discovery it seeks, and admonishes both sides to be as cooperative as possible so as to ensure that discovery is timely completed. . . . The government contends that the material sought by Defendant is protected by the deliberative process privilege. . . . At this stage, the court is unable to determine whether the information sought by Defendant would fall within either the deliberative process or work product categories. However, once the defense sets forth precisely what information it seeks, the court will permit the government to reassert these privileges. The court might then order an *in camera* review of the documents to determine if they truly fall within the parameters of these two doctrines." 880 F. Supp. 271, 281.

ruled against the defendant on the underlying motion to dismiss for selective prosecution, and it held the Government need not turn over to the defendant any of the documents submitted for *in camera* review. *United States v. Bradley*, CR-92-200-01, Mem. & Order 4/27/94. More recently, in *United States v. Llera-Plaza*, 181 F. Supp. 2d 414 (E.D. Pa. 2002), the district court ordered discovery of documents pertaining to other capital-eligible federal prosecutions in the Eastern District of Pennsylvania. After two motions for reconsideration and partial production of the requested documents, the district court ordered the Government "to produce for the court, under seal for its *in camera* inspection, certain of the materials" covered by the earlier order, 181 F. Supp. 2d at 418. The Government complied, *id.* at 420, and on the basis of that evidence the district court ruled that "[t]he government will not be directed to turn over any of the submitted materials to the defendants because, in the court's judgment, the materials contain no evidence supportive of the defendants' Motion to Bar the Death Penalty." 181 F. Supp. 2d at 420. Accordingly, the defendants' motion to dismiss was denied on the merits. *Id.* at 421.[18]

[18] In other reported post-*Armstrong* cases in which the Government has appealed district court orders granting discovery on claims of selective prosecution, the Government has consistently provided more information to the lower court, and created a more complete record, than in this case. In *United States v. Turner*, 104 F.3d 1180 (9th Cir. 1996), which was decided in the district court before *Armstrong* and reviewed on appeal after *Armstrong*, the Government submitted extensive affidavits, on the record and under seal, for the district court's use in its initial decision on the discovery motion. In *United States v. Olvis*, 97 F.3d 739 (4th Cir. 1996), the Government presented extensive affidavits and testimony describing its charging practices. And in *United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997), the

(Continued on following page)

The issues of privilege, relevance and undue burden are not the only ones that have been left unresolved in the lower courts. The substantive motion to which the trial court's discovery order was directed – Respondent's motion to dismiss the request for the death penalty – has never been reached. One of the important advantages of the *in camera* production procedure suggested by the Sixth Circuit is that it would enable the district court to address the discovery motion and the underlying motion to dismiss simultaneously, on the basis of adequate facts. This is exactly what happened in *United States v. Bradley*, and *United States v. Llera-Plaza*. In the present case, if the discovery order is reversed on review, the district court will have to consider that motion to dismiss in the absence of any evidentiary assistance from the Government.

Government ultimately complied with much of the discovery order, and submitted one disputed document to the district court for *in camera* review. (In at least two cases the Government complied fully with such discovery orders in the district court. In *United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999), the Government complied with a similar discovery order, and made the same discovery available to several other defendants in the same district; only one of the defendants who obtained discovery persisted in his motion to dismiss, and it was denied. *See, United States v. Daniels*, 141 F. Supp. 2d 140, 143, 145 (D. Mass. 2001). And in *United States v. Correa-Gomez*, 160 F. Supp. 2d 748 (E.D. Ky. 2001), *appeal pending*, the Government produced the required discovery under seal, and the district court granted the defendant's motion to dismiss. *See also Branch Ministries, Inc. v. Charles Rossotti*, 970 F. Supp. 11 (D.D.C. 1997) and 40 F. Supp. 2d 15 (1999), a civil case against the Internal Revenue Service in which the Government complied with a discovery order issued under the authority of *Armstrong*.) In the present case the Government has presented no factual information whatever, under seal or otherwise – not at the original hearing on the motion for discovery, not on its motion for reconsideration, not in compliance with the discovery motion itself, and not on remand from the Sixth Circuit.

In addition, the Petition for Certiorari makes new factual claims that were never made to the district court and are not part of the record on appeal. The Government criticizes the Sixth Circuit for relying "on incomplete statistics from which the court drew inferences that are now known to be incorrect." Pet., p. 15. This is a disputed factual argument, and, Respondent submits, it is wrong. More important, the argument is based on materials that the Government itself admits "were released after the district court's decision and provided to the court of appeal" (Pet., p. 14) – to wit, the Ashcroft Report, *supra* note 2, which was lodged with the court the week before oral argument. The Sixth Circuit, of course, could not properly consider that report on appeal because it had not been in the record before the district court. But if the report materially supports the Government's claims, why did the Government fail to bring it to the attention of the district court on remand, by motion for reconsideration or otherwise?

Finally, the Government contends that the Sixth Circuit's discussion of data on plea bargains in federal capital cases is immaterial because Respondent "was offered a plea bargain but declined to take it." (Pet., p. 16) This is a highly debatable claim, to say the least, considering that there is a pending motion to dismiss the indictment against Respondent, based on substantial allegations of governmental misconduct that produced an extraordinary violation of the confidentiality that was promised to the Respondent in his plea negotiations with the Government. *See supra,* note 2. More important, although the Government raised this claim in oral argument in circuit court, and in its petition for rehearing en banc, it has never addressed the issue in district court – not in its brief

or argument on the original motion for discovery, not in its motion for reconsideration, and not on remand from the Sixth Circuit after the issue was addressed in that appellate court in the absence of a factual record.

III. THE DECISION BELOW AFFIRMING THE DISCOVERY ORDER IS CONSISTENT WITH CONTROLLING PRECEDENTS FROM THIS COURT

The Government argues that the decision of the court of appeals "violates the teachings of *McCleskey v. Kemp* [481 U.S. 279 (1987)]." Pet., p. 17. The short answer is stated succinctly in the Sixth Circuit's opinion: The issues are not the same. In *McCleskey* this Court had to decide:

> whether the defendant had carried his burden of proof on the *merits* of his selective prosecution claim. In contrast, we must determine only whether Bass has shown "some evidence tending to show the existence of . . . discriminatory intent" sufficient to warrant *discovery*. . . . *McCleskey* will certainly preclude Bass's selective prosecution claim if, at the end of discovery, he fails to show any additional evidence that the United States intentionally discriminates against blacks through the death penalty protocol. It does not, however, pose any bar to Bass at this preliminary stage.

266 F.3d 532, 539-40 (citations omitted, emphasis added). (McCleskey, of course, received extensive discovery in preparation for his selective prosecution claim, beyond

anything Respondent has sought in this case.)[19] As the circuit court points out, "[o]bviously, a defendant need not prove his case in order to justify discovery on an issue." *Id.*, quoting *United States v. Jones*, 159 F.3d 969, 978 (6th Cir. 1998).

Even so, an additional short comment on *McCleskey* is in order. In *McCleskey* the Court denied the defendant's claim in part because it is extremely "difficult to deduce a consistent policy by studying the decisions of [the] ... many unique entities" involved in capital charging, prosecution and sentencing in Georgia. 481 U.S. at 295, n.15. The Government cites this footnote but neglects to point out the striking differences between the issues here and in *McCleskey*. First, since the only question here is *charging*, there is no need to consider the actions of juries (the most unique and least accountable of the "many entities" in *McCleskey*) or of judges. Second, even when the focus is limited to the decision to charge, this case presents a far simpler situation than *McCleskey*: the charging decisions in *McCleskey* were made under the authority of hundreds of separate District Attorneys, each of whom "is elected by the voters in a particular county." *Id.*, citing. Ga. Const., Art. 6, § 8, para. 1. The charging decisions here were all made by a single unified agency, the United States Department of Justice.

The Government faults Respondent for relying on nationwide statistics, and argues that the various United

[19] *See, e.g.*, 481 U.S. at 361 n.13: "As a result of McCleskey's discovery efforts, the record also contains relevant testimonial evidence by two state officials." (Describing the depositions of prosecutors Lewis R. Slaton and Russel Parker on the bases for their capital charging decisions.)

States Attorneys make "independent decisions" whether to charge defendants with capital eligible offenses. Pet., p. 18. In fact, unlike the hundreds of constitutionally separate and independently elected District Attorneys in Georgia,

> All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General [except certain functions concerning administrative law judges and Federal Prison Industries].

28 U.S.C. § 509; *see also* 28 U.S.C. § 519. Judge Learned Hand described this system in 1930:

> The Attorney General has powers of "general superintendence and direction" over [United States] district attorneys [citation omitted]. ... Thus he may displace [federal] district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive. ... His powers must be coextensive with his duties.

Sutherland v. International Insurance Co., 43 F. 2d 969, 970 (2d Cir. 1930); *see also United States v. Sells Engineering*, 463 U.S. 418, 470-72 (1983) (Burger, C.J., dissenting). The Department of Justice's official position is the same. 6 Op. O.L.C. 47 (1982) (T. Olson, Asst. A.G., O.L.C.). The elaborate "protocols" that regulate federal capital charging are a striking illustration of this centralized power. Just as "[t]he decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer," *McCleskey*, 481 U.S. at 295, n.15, the decisions

of a single prosecutorial agency over time are fairly attributable to the agency.

In *United States v. Llera-Plaza, supra*, the Government took exactly the opposite position to the one it argues here:

> [T]he government contends that it is inapposite to single out another case in this district – Merlino – for comparison with the case at bar, as distinct from comparing the case at bar with any or all of the scores of federal criminal prosecutions for death-eligible offenses in other districts.

181 F. Supp. 2d at 420. In truth, discrimination by race at either level is unconstitutional. It is a violation of the equal protection clause to stop or search a motorist because of his race, *United States v. Whren*, 517 U.S. 806, 813 (1996), whether the decision to do so is based on a general practice of the police department, or the individual predilections of a specific officer. At this point, of course, Respondent cannot *prove* discrimination either nationally or locally, but he has made a sufficient showing to justify the district court's order granting discovery.

In determining that Respondent made a sufficient showing to justify discovery, the court of appeals correctly applied this Court's decision in *United States v. Armstrong*, 517 U.S. 456 (1996). Under *Armstrong*, a defendant seeking discovery must present "some evidence tending to show the existence of the essential elements of the defense" of discriminatory prosecution – that is, the defendant must present some evidence of discriminatory effect and discriminatory intent. *Id.* at 468, quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974). In the usual case, this preliminary showing on discriminatory

effect must include "some evidence that similarly situated defendants of other races could have been prosecuted, but were not . . . ." *Id.* at 469.

One could argue that the stark racial disparities reflected in the DOJ Study are themselves "some evidence" of differences in prosecution patterns by race[20] – but that is not necessary. As the court of appeals points out, at the time the DOJ Study was released, Deputy Attorney General Holder admitted this disparate impact: "I can't help but be both personally and professionally disturbed by the numbers that we discuss today. . . . [N]o one reading this report can help but be disturbed, troubled, by this disparity. . . . I'm particularly struck by the facts that *African-Americans and Hispanics are overrepresented in those cases presented for consideration of the death penalty*, and those cases where the defendant is actually sentenced to death." *United States v. Bass*, 266

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[20] In *Ah Sin v. Wittman*, 198 U.S. 500 (1905), the defendant complained about his conviction under an ordinance "prohibiting persons from setting up gambling tables in rooms barricaded to stop police from entering." *See, Armstrong*, 517 U.S. at 566. The Court held that in addition to alleging "that the ordinance is enforced 'solely and exclusively against persons of the Chinese race and not otherwise'," *id., quoting Ah Sin*, 198 U.S. at 507, he had to allege "that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced." *Id.* In *Armstrong* itself the comparable issue was the racial composition of the corps of crack cocaine traffickers in Los Angeles in 1992. Arguably, a glaring racial disparity has more obvious implications in the context of the entire universe of federal capital murder prosecutions than in the comparatively obscure contexts in *Ah Sin* and *Armstrong* – especially given such well known background facts as the proportion of white defendants on federal death row (21% as of July, 2000) and the proportion of white defendants on state death rows (55%). DOJ Study at 36 n.28.

F.3d at 538 (emphasis in original). In *Armstrong* the Court reserved the question of whether a prosecutorial admission of *discriminatory purpose* would suffice to fulfill the defendant's burden on discriminatory effect.[21] Here we have a simpler situation: a Governmental *admission of discriminatory effect*, which is necessarily sufficient proof on the very point that is admitted.[22]

And what about discriminatory intent? In *Armstrong* this Court did not specify how that element should be proven, and for good reason. Ultimately, under *McCleskey*, a defendant who alleges discriminatory prosecution must prove discriminatory intent in his specific case, but, in the nature of the issue, the lower burden that must be carried at the initial stage of discovery will generally be met by circumstantial evidence. In this case, the court of appeals relied on two factors:

> [T]he stark discriminatory effect of the federal death penalty protocol, coupled with the Department of Justice's official statements recognizing the possibility of intentional discrimination in light of the protocol's discriminatory effect

[21] "We reserve the question whether a defendant must satisfy the similarly situated requirement in a case 'involving direct admissions by [prosecutors] of discriminatory purpose.' Brief for United States 15." *Armstrong*, 517 U.S. at 469 n.3.

[22] In addition, the Sixth Circuit notes that the record includes evidence of a narrower class of white defendants who were treated more favorably than black defendants in federal capital prosecutions: " . . . Bass has identified a pool of similarly situated defendants – those whose crimes shared sufficient aggravating factors that the United States chose to pursue the death penalty against each of them. Of those defendants, the United States enters plea bargains with one in two whites; it enters plea bargains with one in four blacks." *Bass*, 266 F.3d at 539.

> presents some evidence tending to show that race in fact plays a role in the United States's decision-making process.

Bass, 266 F.3d at 540.

This last point deserves some emphasis. At the time the DOJ Study was released, Attorney General Reno held a press conference, a transcript of which is in the record below. Joint Appendix ("JA") pp. 94-104. After describing the findings in general terms, and expressing her deep concern about the racial disparities reported, she said:

> More information is needed to better understand . . . how homicides make their way into the federal system, and once in the federal system, why they follow different paths. An even broader analysis must be undertaken to determine if bias does, in fact, play any role in the federal death penalty system.

JA p. 96. She called for studies by experts outside the Department. This was an official statement by the Attorney General who authorized the request for the death penalty in this very case, in reaction to a study she commissioned on the operation of the federal death penalty protocols that were enacted in her administration and under which this defendant was charged. As the Sixth Circuit notes, the Attorney General (like the Deputy Attorney General) was deeply troubled because race may have been biasing federal capital charging, and required more information – from outside experts – to know for sure. 266 F.3d at 539. Accordingly, the court of appeals concludes:

> If the Department of Justice's official position is that these statistics, standing alone, show

> sufficient evidence of the possibility of racial animus to warrant further study, we cannot fairly deny Bass the same opportunity to investigate [that claim] . . . .

Id. Given the circumstances reflected in the record, it was appropriate under *Armstrong* for the circuit court to require the Government to at least attempt to address the factual issues raised by Respondent's motion for discovery.[23]

IV. THIS IS NOT AN APPROPRIATE CASE FOR REVIEW BY THIS COURT ON CERTIORARI

In its petition to this Court, the Government argues that the discovery order in Mr. Bass's case "threatens to stop federal death penalty prosecutions in their tracks," (Pet., p. 12) and "has the potential to disrupt all federal capital cases . . . ." Pet., p. 22. This is melodramatic hyperbole. In fact this case has few implications, if any, for other federal prosecutions – as the Government's petition itself demonstrates.

The decision of the Sixth Circuit was filed on September 25, 2001. In footnote 8 to its petition (Pet., p. 22) the

[23] In the meantime, the National Institute of Justice issued a request for proposals to conduct the independent study of the federal death penalty that was ordered by Attorney General Reno in 2000, and is in the process of awarding the contract for the study. *See* National Institute of Justice, *Solicitation, Research Into the Investigation and Prosecution of Homicide: Examining the Federal Death Penalty System* (July 20, 2001). See *also generally* Dennis O'Brien and David Nitkin, *Glendening Halts Executions; Md. Governor Is Second to Impose Moratorium; Racial, Geographic Inequality Seen; UM Study to Be Reviewed by next General Assembly*, The Baltimore Sun, May 10, 2002, p.1A.

Government lists a dozen cases in which discovery motions similar to the one at stake were rejected. The first opinion cited as inconsistent with the *Bass* decision – *United States v. Jones*, 2002 WL 464678 (5th Cir. 2002) – was filed in late March, 2002, six months after the *Bass* opinion; the second opinion cited in that footnote, *United States v. Minred*, 182 F. Supp. 2d 459 (W.D. Pa. 2002), was filed in February, 2002, over four months after the decision in *Bass*, and shortly before the Government requested an extension of time to file its petition for certiorari. In addition, although not cited by the Government, there is *United States v. Llera-Plaza*, 181 F. Supp. 2d 414 (E.D. Pa. 2002), decided in early January, 2002, in which the district court, after reviewing an *in camera* submission by the Government, denied further discovery as well as the defendant's underlying motion to dismiss. See *supra* text at notes 16-17. The Government's doomsday warnings notwithstanding, this case has hardly affected other federal prosecutions at all, let alone stopped the federal death penalty in its tracks. This modest impact should be no surprise, given the nature of the case: a circuit court opinion on an interlocutory appeal, affirming a discretionary discovery order by a district court judge and remanding the case to give the Government an opportunity to make a presentation to the district court *in camera*.

In addition, even if other courts were inclined to exercise their discretion in the same manner as the district court here, only a handful of other cases share the same factual context. Respondent's motion for discovery was based primarily on a Department of Justice study of the federal death penalty that was conducted under former Attorney General Janet Reno, and on comments made by Attorney General Reno and Deputy Attorney

General Eric Holder at the time that study was released. As the Government points out (Pet., pp. 14-15), the current Attorney General, John Ashcroft, released a second internal study of the federal death penalty in June 2001, which, he claimed, laid to rest any worry that the federal death penalty is affected by racial discrimination.[24] In addition, and more important, in June 2001, Attorney General Ashcroft changed the "protocol" for charging capital and potentially capital federal crimes in two major respects: (1) United States Attorneys are now required to report to the Justice Department in Washington any cases that they might have charged as federal capital crimes but did not; and (2) local federal prosecutors may no longer enter into plea bargains in capital cases without the approval of the Attorney General. Pet., p. 5, n.1.

Arguably, the record in this case speaks only to those federal capital prosecutions that were begun before the administration of Attorney General Ashcroft. Certainly this record has no direct implications for any case in which the request for the death penalty was filed later than June, 2001. As best we can determine, among 31 pending federal capital indictments, there are at most 7 cases (and probably fewer) that are plausibly similarly situated to *Bass* and in which the question before the Court has not yet been reached,[25] and in some of those cases the

[24] As Respondent has noted, *supra* note 2, the Government brought that study to the attention of the circuit court on appeal, but made no effort to put it before the district court on remand.

[25] In the absence of data from the Department of Justice itself, the best available information on this issue can be found at http://www.capdefnet.org/fdprc/contents/shared_files/docs/time.htm, a web page maintained by the Federal Death Penalty Resource Counsel (FDPRC), an organization funded pursuant to the Criminal Justice Act to provide

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defendants have no standing to raise the issue at stake here because they are white. (All future federal capital cases, of course, will be well beyond the range of this record). Judging from the track record to date, the Sixth Circuit opinion in the present case is not likely to influence the course of even one of that handful of pending prosecutions.

V. CONCLUSION

For the reasons stated, Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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consultation and litigation support services to Federal Defenders, courts, and private defense counsel appointed in federal death penalty prosecutions. According to the FDPRC, there are 31 pending capital indictments that have not been tried, involving 38 defendants. (An additional three cases with four defendants are awaiting re-trial, but in those cases this issue will have been raised, if at all, before the initial trial). Of these 31 indictments, only 5 indictments, including 7 defendants, were filed during the tenure of Attorney General Reno. An additional 3 cases with 5 defendants were filed after Reno left office but before June, 2001. For 3 single-defendant indictments the date on which the notice of intent to seek the death penalty was filed is not listed; judging from the trial and indictment dates it appears that in one of these three cases the notice of intent was filed before June, 2001. This means that 9 cases involving 13 defendants could possibly be similarly situated to Mr. Bass. In at least 2 of these 9 cases, including 3 defendants, the motion at issue here has already been denied. *United States v. Llera-Plaza, supra*; *United States v. Minred, supra*.